UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

MICHAEL BOSWELL, an incapacitated person by his guardian ad litem, Ethel Boswell, and ETHEL BOSWELL, Individually, Plaintiffs STEVE EOON, KIRSTEN BYRNES, CHRISTINA EICKMAN, PTL. JAMES FEASTER, NEW BRUNSWICK POLICE DEPARTMENT, CITY OF NEW BRUNSWICK, and JOHN DOES (1 through 5) Defendants	08 CV 05098(GEB)(LHG) **Document Filed Electronically**

PLAINTIFFS' BRIEF IN SUPPORT OF MOTION
FOR RECONSIDERATION PURSUANT TO RULE 7.1(i)

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STATEMENT OF FACTS

Plaintiffs have filed a motion for reconsideration of the grant of summary judgment to the defendants because they believe that the court has overlooked, misunderstood or misconstrued the facts pertaining to Officer Feaster's knowledge of Mr. Boswell's intoxication. The court granted summary judgment after finding that plaintiffs could not meet the second element of a state created danger claim, which requires a showing that the state actor acted with a degree of culpability that shocks the conscience. In support of this finding, the court referred to some of the paragraphs in plaintiffs' Rule 56.1 Responding Statement of Material Facts and concluded that "[b]ecause both parties agree that Officer Feaster did not know Boswell was intoxicated when he directed him to leave the park, Officer Feaster did not know of and disregard a risk to Boswell's safety." *[See Plaintiff's Exhibit A: Opinion, p. 6]* However, plaintiffs specifically disagreed with Officer Feaster's deposition testimony regarding his knowledge of Mr. Boswell's intoxication, and indicated this disagreement in the Rule 56.1 Responding Statement of Material Facts and in Point I of their brief.

Plaintiffs freely admitted to Officer Feaster's testimony regarding his employment and training with the New Brunswick Police Department. *[See Plaintiff's Exhibit B: Plf's 56.1 ¶s 5 to 11]* Plaintiffs freely admitted to Officer Feaster's testimony regarding his patrol of the park on September 5, 2005 and his initial interaction with Mr. Boswell. *[See Plaintiff's Exhibit B: Plf's 56.1 ¶s 12 to 24]* Plaintiffs freely admitted to Officer Feaster's testimony regarding his writing of a ticket to Mr. Boswell for being in the park after hours. *[See Plaintiff's Exhibit B: Plf's 56.1 ¶s 25 to 26]* Plaintiffs freely admitted to Officer Feaster's testimony regarding his ordering Mr. Boswell out of the park and his re-directing Mr. Boswell to Route 18 and Commercial Avenue after Mr. Boswell headed for the river. *[See Plaintiff's Exhibit B: Plf's 56.1 ¶s 27 to 33]* Plaintiffs freely admitted to Officer Feaster's testimony that he saw a quart bottle and did not see Mr. Boswell drink from it but believed that he did drink from it. *[See Plaintiff's Exhibit B: Plf's 56.1 ¶s 35 to 36]* Plaintiffs freely admitted to Officer Feaster's testimony that he saw Mr. Boswell rip up the ticket, that he wrote a second ticket and that he watched Mr. Boswell leave the park. *[See Plaintiff's Exhibit B: Plf's 56.1 ¶s 37 to 41]* Plaintiffs freely admitted to Officer Feaster's testimony that he chose not to arrest Mr. Boswell, that he was told by the dispatcher that there was an accident, that he drove to Route 18 and Commercial Avenue and saw Mr. Boswell under the car, that he radioed for an ambulance and a supervisor, and that Officer Barber took over the investigation. *[See Plaintiff's Exhibit B: Plf's 56.1 ¶s 45 to 50]* Plaintiffs freely admitted to Officer Feaster's testimony that he did not see Mr. Boswell cross the intersection. *[See Plaintiff's Exhibit B: Plf's 56.1 ¶ 51]*

But plaintiffs did not admit to the claims Officer Feaster made in his deposition testimony regarding his knowledge of Mr. Boswell's intoxication. Plaintiffs admitted only to the fact that Officer Feaster made certain claims in his deposition testimony, not that these were true or that they were accepted without reservation by plaintiffs. Plaintiffs admitted only to the fact that Officer Feaster **claimed** that he did not observe Mr. Boswell having any difficulty walking. *[See Plaintiff's Exhibit B: Plf's 56.1 ¶ 41]* Plaintiffs admitted only to the fact that Officer Feaster **claimed** that Mr. Boswell appeared to understand him, was cooperative with him and responded immediately and appropriately to all commands. *[See Plaintiff's Exhibit B: Plf's 56.1 ¶ 42]* Plaintiffs admitted only to the fact that Officer Feaster **claimed** that Mr. Boswell's speech was clear and coherent, that his physical coordination was controlled and balanced, and that he detected no odor of alcohol during his interaction with Mr. Boswell. *[See Plaintiff's Exhibit B: Plf's 56.1 ¶ 41]*

To counter these claims, plaintiffs presented expert testimony from Dr. Saferstein that with a 0.244% blood alcohol level, Mr. Boswell's condition of significant impairment would have been obvious to anyone who came in contact with him, and that he would have had a significant reduction in muscular coordination, exhibiting poor balance and poor body concentration. *[See*

Plaintiff's Exhibit B: Plf's 56.1 ¶ 56a] Dr. Saferstein opined that the visibly impaired condition of Mr. Boswell would have been obvious to a reasonably trained and reasonably perceptive police officer. *[See Plaintiff's Exhibit B: Plf's 56.1 ¶ 56b]* Plaintiffs also submitted the testimony of Dr. Gary Lage, the expert for defendants Byrnes and Eickman, who opined that at a level of 0.244%, the cerebellum, the frontal lobe, and the psychomotor are all affected. He opined that even a person untrained in observing alcohol intoxication would recognize that a person within the range of .2 to .4 would be intoxicated, and he opined that a person trained in alcohol detection would be more observant of the signs and symptoms and effects of alcohol. *[See Plaintiff's Exhibit B: Plf's 56.1 ¶ 56d]* Dr. Lage opined that at that level, Mr. Boswell would have had lack of coordination, would not be able to function correctly, would probably not be able to walk correctly, and would exhibit more observable effects such as impaired reaction time, markedly delayed reaction times, impaired vision, including depth perception, night vision and peripheral vision. *[See Plaintiff's Exhibit B: Plf's 56.1 ¶ 56e]* Dr. Lage stated that he would have expected a trained observer such as Officer Feaster to have observed the visible effects of intoxication in Mr Boswell. *[See Plaintiff's Exhibit B: Plf's 56.1 ¶ 56f]*

Plaintiffs admitted only to the fact that Officer Feaster **claimed** that based on his training and experience, he made sufficient observations of Mr. Boswell to determine that he was not intoxicated. *[See Plaintiff's Exhibit B: Plf's 56.1 ¶ 41]* Plaintiffs admitted only to the fact that Officer Feaster **claimed** that based on his training and observation he did not believe that Mr. Boswell was under the influence of alcohol or a controlled substance. *[See Plaintiff's Exhibit B: Plf's 56.1 ¶ 44]*

To counter these claims, plaintiffs presented James A. Williams, a police liability expert, who opined that Officer Feaster ignored his training by failing to remove Mr. Boswell from the park, and that Officer Feaster grossly failed to use due caution and known procedures for handling intoxicated persons. *[See Plaintiff's Exhibit B: Plf's 56.1 ¶s 54a to 54e]* Mr. Williams indicated that Dr. Lage's opinion regarding the level of Mr. Boswell's intoxication and Officer Feaster's testimony that Mr. Boswell was not intoxicated were "conflicting statements". He stated that there is no factual documentation that Officer Feaster made an effort to provide the mandated police policy and procedural requirements to safely remove an intoxicated and homeless Michael Boswell to a shelter for safety and detoxification. *[See Plaintiff's Exhibit B: Plf's 56.1 ¶ 56f]*

Point I of plaintiffs' brief opposing the motion for summary judgment brought all of this together in the argument that summary judgment should be denied because there are disputed material facts. The disputed material facts included Officer Feaster's claim that he saw nothing to indicate that Mr. Boswell was intoxicated or incapacitated, but that plaintiffs' experts opined that Mr. Boswell would have shown visible signs and symptoms of intoxication. Another disputed material fact noted was whether Officer Feaster observed signs and symptoms of intoxication in Mr. Boswell, especially since he admitted that Mr. Boswell headed for the river when told to leave the park and had to be re-directed. *[See Plaintiff's Exhibit C: Point I of Plaintiffs' Brief]*

It is these facts that plaintiffs believe the court overlooked, misunderstood or misconstrued in making the factual finding that "both parties agree that Officer Feaster did not know Boswell was intoxicated when he directed him to leave the park." *[See Plaintiff's Exhibit A: Opinion p. 6]* Had these facts not been overlooked, the result might reasonably be different. Therefore, it is requested that the motion for reconsideration be granted.

LEGAL ARGUMENT

THE MOTION FOR RECONSIDERATION SHOULD BE GRANTED BECAUSE THE COURT OVERLOOKED, MISUNDERSTOOD OR MISUNDERSTOOD THE FACTS RELATING TO OFFICER FEASTER'S TESTIMONY REGARDING HIS KNOWLEDGE OF MR. BOSWELL'S LEVEL OF INTOXICATION

Local Civil Rule 7.1(i) creates a procedure by which a court may reconsider its decision upon a showing that dispositive factual matters or controlling decisions of law were overlooked by the court in reaching its prior decision. Bryan v. Shah, 351 F.Supp.2d

295, 297 (D.N.J. 2005). A decision "may be altered or amended if the party seeking reconsideration shows at least one of the following grounds: (1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court granted the motion for summary judgment; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice." Max's Seafood Café by Lou-Ann, Inc. v. Quinteros, 176 F.3d 669, 677 (3d Cir. 1999). A motion for reconsideration should be granted only where the facts or controlling legal authority were presented to but overlooked by the district court. Arista Records, Inc. v. Flea World, Inc., 356 F.Supp.2d 411, 415 (D.N.J. 2005). One of the purposes of the motion is to correct manifest errors of law or fact. In re Sharps Run Associates, L.P., 157 B.R. 766, 785 (D.N.J. 1993). The only proper ground for granting a motion for reconsideration is that the matters or decisions overlooked, if considered by the court, might reasonably have altered the result reached. Starr v. JCI Data Processing, Inc., 767 F.Supp. 633, 635 (D.N.J. 1991).

The standard of review for a motion for reconsideration is high, and a party must show more than a disagreement with the court's decision. Hatco Corp. v. W.R. Grace & Co., 849 F.Supp. 987, 990 (D.N.J. 1994). Plaintiffs meet the standard. The court misunderstood or misconstrued plaintiffs' Rule 56.1 statements regarding the deposition testimony of Officer Feaster, and a proper consideration could reasonably alter the resulting judgment.

In their Rule 56.1 Responding Statement of Material Facts, plaintiffs were admitting only to the fact that Officer Feaster made certain claims in his deposition testimony regarding his knowledge of Mr. Boswell's intoxication. **Plaintiffs were not agreeing with those claims.** Officer Feaster claimed in his deposition testimony that he did not observe Mr. Boswell having difficulty walking, that Mr. Boswell's physical condition was controlled and balanced, that Mr. Boswell was clear and coherent, and that there was no odor of alcohol. Plaintiffs did not agree with these claims, but could not deny the fact that the claims were made. Plaintiffs expressed their disagreement with the claims by countering this testimony with the expert opinions of Dr. Saferstein and Dr. Lage that with a .244% BAC, Mr. Boswell would have been visibly intoxicated and would have exhibited signs and symptoms of intoxication and would not have been able to function correctly.

Plaintiffs were also admitting only to the fact that Officer Feaster claimed in his deposition testimony that his determination that Mr. Boswell was not intoxicated was based on his training and experience. Plaintiffs did not agree with these claims, but could not deny the fact that they were made. Plaintiffs expressed their disagreement with the claims by countering this testimony with the expert testimony of Mr. Williams that Officer Feaster grossly failed to use trained and known procedures for handling intoxication persons. Officer Feaster's testimony was also countered by Mr. Williams' testimony that Officer Feaster's testimony and Dr. Lage's opinions were conflicting statements that reinforced his opinion that Officer Feaster did not make an effort to provide the mandated police policy and procedural requirements to safely remove Mr. Boswell to a shelter.

These conflicts and disputed facts were vigorously argued by plaintiffs in Point I of their brief to show that summary judgment was inappropriate in light of the disputed material facts.

Reconsideration is appropriate when the judgment has been based on a mistaken fact. In Perdomo v. United States, 2009 WL 483887, U.S. Dist. LEXIS 14637 (D.N.J. Feb. 25, 2009), *[See Plaintiff's Exhibit D]*, the court granted reconsideration because the dismissal of the action was based on the mistaken conclusion that the § 2255 habeas motion was filed in April 2005 and was therefore not filed within the one-year limitation period. After the dismissal, the petitioner demonstrated that he had actually submitted the motion to the court in April, 2003, but that the court had no record of this filing. Here, plaintiffs have demonstrated that they did not agree that Officer Feaster did not know Mr. Boswell was intoxicated, and that there was evidence sufficient to establish that he knew or should have known of the intoxication.

Reconsideration is appropriate when the court has misunderstood the facts in the record. In Porter v. United States, 2006 WL 2614221, U.S. Dist. LEXIS 64385 (D.N.J. Sept. 11, 2006), *[See Plaintiff's Exhibit E]*, reconsideration of a § 2255 motion that claimed ineffective assistance of counsel because of the failure of counsel to file a direct appeal of the conviction was granted. In his submissions to the court, Porter acknowledged that he had not filed a direct appeal from the judgment of conviction, but he alleged that his counsel was ineffective for failing to file a notice of appeal despite his request to counsel to do so. Porter's attorney stated that his files contained no reference to a request for appeal by Porter. Based on these submissions, the court found that the recollections of Porter and his counsel were not in conflict and that Porter had demonstrated that his counsel was ineffective for failing to file a notice of appeal after Porter had requested him to do so. Because the court concluded that the submissions revealed no contested factual issues, an evidentiary hearing was not scheduled and the court granted Porter's motion to the extent it claimed ineffective assistance of counsel, and enlarged the time for Porter to file a direct appeal.

The government moved for reconsideration, arguing that the Order reflected a misunderstanding of the record because there was a factual dispute between Porter and his counsel as to whether Porter ever requested counsel to file an appeal. The government explained that it was not counsel's contention that he merely has no recollection as to whether Porter asked him to file an appeal; rather, his position is that contrary to Porter's claim, Porter never requested him to file an appeal. The government submitted a

Declaration in which counsel attested that Porter did not ask him to file any appeal on his behalf, and that this is the reason he has no recollection with regard to the filing of an appeal.

In light of counsel's declaration clarifying his recollection and position, the court found that the Order overlooked a point of fact which would have resulted in a conclusion different from that reached. The court stated that by clarifying his previous statements and by unequivocally evidencing that his recollection is that he was not asked to file an appeal, counsel's declaration clearly demonstrates the existence of a factual dispute: that the recollections of Porter and his counsel are at odds. The court concluded that, now having the benefit of the declaration, it had overlooked the dispositive factual matter in rendering its decision. Therefore, the court granted the motion for reconsideration, vacated the order, and scheduled an evidentiary hearing. Here, plaintiffs have clarified their Rule 56.1 statements to show that Officer Feaster knew or should have known that Mr. Boswell was intoxicated and have demonstrated the existence of a factual dispute.

Reconsideration is appropriate when there is evidence from which a finding contrary to the court's finding can be made. In Pfizer, Inc. v. Teva Pharmaceuticals USA Inc., 2007 WL 2814656, U.S. Dist. LEXIS 70896 (D.N.J. Sept. 25,2007), *[See Plaintiff's Exhibit F]*, the plaintiffs moved for reconsideration of an order granting summary judgment to defendants and the holding that plaintiffs had not given the required actual notice to defendants that the defendants' product infringed on plaintiffs' patent. Plaintiffs contended that the court impermissibly decided a genuine issue of material fact in ruling that the actual notice to defendants in the first lawsuit was insufficient to provide notice of infringement with regard to the subsequent product sold by defendants. The court indicated that it had found that for notice purposes the similarities of the products were not so substantially similar to cause the filing of the first complaint to become notice. The court held that the error it committed was to make this finding as a matter of law when there was evidence from which a contrary finding could be made. The court stated that summary judgment should not have been granted and that the issue should have been left to the jury. The court found that the consequences are serious enough to justify correction by means of a Local Rule 7.1(i) motion. Here, plaintiffs have demonstrated that a contrary finding can be made about Officer Feaster's knowledge of Mr. Boswell's intoxication when it is recognized that this issue is disputed and that there is evidence that he knew or should have known that Mr. Boswell was intoxicated.

Reconsideration is appropriate when it can be demonstrated that plaintiffs have presented evidence from which a factfinder can decide that the elements of a claim have been met. In Carton v. Choice Point, 482 F.Supp.2d 533 (D.N.J. 2007), the plaintiffs sought reconsideration of an order dismissing their New Jersey

Consumer Fraud Act claim. Plaintiffs asserted that the court erred when it concluded that there was no possible causal connection between the alleged unlawful practice and plaintiffs' ascertainable loss. Plaintiffs pointed to evidence in the record from which a factfinder could infer that defendants' alleged misrepresentations induced plaintiffs to sign the finder's fee agreement, which defendant in turn used to interfere with plaintiffs' property rights in the stock. Defendant locates owners of unclaimed property and offers to assist them in securing the property's return. Plaintiffs asserted that defendants made knowing misrepresentations and omitted material facts concerning the value of the "asset", inducing plaintiffs to enter into the contract for investigatory and research services. This evidence would establish an unlawful practice under the CFA. Plaintiffs also established that the misrepresentations and omissions induced them to incur a legal obligation in the form of a contractual obligation, which is an ascertainable loss under the CFA. The court held that plaintiffs sufficiently established all three elements of a claim under the CFA, and the motion for reconsideration was granted. Here, plaintiffs have presented evidence that Mr. Boswell was intoxicated to the point of visible impairment and that Officer Feaster knew or should have known that he was intoxicated. By failing to safely remove Mr. Boswell from the park and by actually directing him to Route 18, Officer Feaster engaged in conduct that shocks the conscience. Therefore, plaintiffs have established all the elements of a state created danger claim, and the motion for reconsideration should be granted.

The court found that this is not a situation like that in Kneipp v. Tedder, 95 F.3d 1199 (3d Cir. 1996), where there was evidence that the officers knew the plaintiff was intoxicated but allowed her to walk home. *[See Plaintiff's Exhibit A: Opinion, p. 6]* But if the overlooked, misunderstood or misconstrued facts are applied, the situation is exactly like that in Kneipp - Officer Feaster knew Mr. Boswell was intoxicated but not only allowed him to walk away but actually directed him to the busy highway. Reconsideration should be granted so the court can determine under the correct facts whether a factfinder could decide that Officer Feaster's actions shock the conscience, or whether, even accepting plaintiffs' evidence that he knew or should have known that Mr. Boswell was intoxicated, it can be found as a matter of law that Officer Feaster's conduct does not shock the conscience.

This case was filed in state court and was removed to federal court by the defendants. Plaintiffs intend to re-file in state court to try the non-federal claims. Plaintiffs ask that even if the result reached by the court is not changed, the finding by the court that we agreed or conceded that Officer Feaster did not know Mr. Boswell was intoxicated be deleted, changed or modified. It is clear that plaintiffs did not concede this fact but in fact vigorously disputed it. This is a significant fact in issue and will continue to be disputed in the state action.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the plaintiffs' motion for reconsideration be granted.

RESPECTFULLY SUBMITTED,

GALEX WOLF, L.L.C.
Attorneys for Plaintiffs

By: ______________________
RICHARD GALEX, ESQ.
For the Firm

Dated: June 17, 2010